

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1807

**TITLE** EASTERN AIR LINES, INC., Petitioner V.  
ROBERT F. MAHFOUD, ETC.

PLACE Washington, D. C.

DATE October 9, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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EASTERN AIR LINES, INC., :  
Petitioner, :  
v. : No. 83-1807  
ROBERT F. MAHFOUD. :  
- - - - -x

Washington, D.C.  
Wednesday, October 9, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:02 o'clock a.m.

APPEARANCES:

RICHARD M. SHARP, ESQ., Washington, D.C.;  
on behalf of Petitioner.  
GEORGE EDWIN FARRELL, ESQ., Washington, D.C.;  
on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Eastern Air Lines against Mahfoud. Mr. Sharp, you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD M. SHARP, ESQ.

ON BEHALF OF THE PETITIONER

MR. SHARP: Mr. Chief Justice, and may it please the Court:

The Warsaw Convention and the Montreal Agreement place limits on the liability of air carriers. The question presented by this case is whether courts may award prejudgment interest in excess of those limits.

In this case, Mr. and Mrs. Bernard Mahfoud purchased an airline ticket in Paris, France, that was to take them to their home in New Orleans and to return them to Paris, France. On the return leg of that trip, they were aboard Eastern Flight 66 which crashed near Kennedy Airport in New York. As a result, Mr. and Mrs. Mahfoud were killed, as were 111 other persons.

Mr. Mahfoud's brother initiated this action against Eastern Air Lines and the United States and several other Defendants. Prior to the trial of Mr. Mahfoud's damage claims, Eastern moved for partial



1 summary judgment. It requested the district court to  
2 declare that, in accordance with the Warsaw Convention  
3 and the Montreal Agreement, Eastern's liability for Mr.  
4 and Mrs. Mahfoud's deaths was limited to the sum of  
5 \$150,000 or \$75,000 per person.

6 The district court granted that motion, but  
7 the district court also ruled that the Plaintiffs could  
8 recover prejudgment interest in excess of the limits  
9 contained in the Warsaw Convention and the Montreal  
10 Agreement.

11 Eastern appealed, the Court of Appeals  
12 confirmed, and we now contend before this Court that  
13 both of the courts below erred in their prejudgment  
14 interest ruling. The basis of our position rests on  
15 four points. They are:

16 First, the text of Article 22.1 of the Warsaw  
17 Convention;

18 Second, the text of Article 24 of the Warsaw  
19 Convention;

20 Third, the text of the Montreal Agreement;

21 And fourth, the negotiating history of both of  
22 those documents.

23 I'd like to turn now to the text of Article  
24 22.1, which appears at page 3 of the blue brief. Before  
25 I read that text, I'd like to point out that this is the

1 particular sentence in the Warsaw Convention that  
2 establishes the limit on liability. It also gives us  
3 some indication of the scope of that limit. In the  
4 second sentence of Article 22.1, we have the indication  
5 as to when the liability is to be valued so that the  
6 limit can be placed on it.

7 Turning now to the first sentence of Article  
8 22.1, it provides that: "In the transportation of  
9 passengers the liability of the carrier for each  
10 passenger shall be limited to the sum of 125,000  
11 francs."

12 Now, the liability is obviously specific.  
13 It's for 125,000 francs. And it's fixed or mandatory,  
14 that is the liability "shall be limited." I think the  
15 most important concept in this sentence is what the  
16 limit applies to, and that is the limit applies to the  
17 "liability of the carrier for each passenger."

18 It's our position that prejudgment interest is  
19 necessarily a part of this concept of liability of the  
20 carrier for each passenger. Prejudgment interest is an  
21 item of the Plaintiff's recovery. The function of  
22 prejudgment interest is simply to calculate the  
23 Plaintiff's damages so that the Plaintiff will receive  
24 full compensation at the date of judgment, and the  
25 Warsaw Convention itself sets up a system providing that

1 a Plaintiff may bring a claim and reduce that claim to  
2 judgment in a court of law.

3 The Warsaw Convention system, then,  
4 necessarily contemplates that there will be a delay of  
5 some sort between the accident and the date of judgment  
6 when the Plaintiff is to be paid. It leaves to the law  
7 of the nation states whether or not they will take  
8 account of this delay.

9 And the standard way, the way this delay was  
10 taken account of here, was to provide prejudgment  
11 interest by method of a formula, that is, a fixed rate,  
12 percentage rate, over a period of time. But the same  
13 thing may be accomplished where a court or a legal  
14 system instructs its courts, its jurors, to simply value  
15 the Plaintiff's claim as of the date of the judgment.

16 Under either of those systems, some  
17 prejudgment interest passes to the Plaintiff, and under  
18 either of those systems that prejudgment interest in our  
19 view is part of the carrier's "liability for each  
20 passenger."

21 Now, I'd like to turn next to the second  
22 sentence of Article 22. This sentence indicates the  
23 time at which the limit is to be applied. It states:  
24 "Where, in accordance with the law of the court to which  
25 the case is submitted, damages may be awarded in the

1 form of periodical payments, the equivalent capital  
2 value of said damages shall not exceed the sum of  
3 125,000 francs."

4 Now, the first thing to point out about this  
5 sentence is that, as with the rest of the convention,  
6 this sentence presupposes that the liability of the  
7 carrier will be established in a judicial proceeding.  
8 The sentence speaks of there being a court of law to  
9 which the case is submitted.

10 But the sentence also indicates -- it deals  
11 now with a situation where the judgment will not be for  
12 a lump sum, but the judgment will be in the form of an  
13 order to pay out various payments over a period of  
14 time. And it indicates that the future periodic  
15 payments contemplated by this section are to be  
16 capitalized to the date of the award, and that capital  
17 amount of the award cannot exceed the limit. In effect,  
18 this sentence says that the equivalent capital value of  
19 the award shall not exceed 125,000 francs.

20 Now, we have some further help in this regard  
21 from the original version of the Warsaw Convention. The  
22 text that you have before you, the English text, uses  
23 the word "damages." The corresponding word that appears  
24 in the official French version of the convention is  
25 "indemnité."



1           If one consults the French legal dictionary  
2       that this Court relied upon in Sack's, a dictionary  
3       published in 1931, "indemnité" is defined as a  
4       reparation or compensation. That dictionary says that  
5       "indemnité" is "indemnity conferred by judgment," and  
6       that "it ordinarily takes the form of damages and  
7       interest."

8           If you fit this together, what we draw from  
9       this sentence is that, when damages and interest are  
10      awarded, not in the form of a single lump sum, but in  
11      the form of periodic payments, the capital value of that  
12      award shall not exceed 125,000 francs. So what we draw  
13      from that is that Article 22.1 indicates that the limit  
14      imposed by this convention is to be applied to the  
15      carrier's liability as of the date of the judgment.

16          I'd like to turn next to Article 24 of the  
17      convention. Article 24 --

18          QUESTION: Before you do that, Mr. Sharp, what  
19      has your research disclosed in the way of cases from  
20      other countries who are parties to the treaty with  
21      regard to their interpretation of Article 22 and its  
22      meaning?

23          MR. SHARP: Your Honor, I can report three  
24      cases, none of which have a reasoned opinion, but  
25      provide results. One case is reported by Professor

1 Drion in his treatise, and I believe we have cited that  
2 case in our main brief. It is a case from Brussels, in  
3 which interest is awarded in a commercial case in excess  
4 of the limit.

5 There are two cases cited in our reply brief,  
6 one from France and one from Great Britain, in which  
7 interest is not awarded in excess of the limit. In none  
8 of those cases can we find any explanation for the  
9 court's reasoning or the result.

10 QUESTION: Have you found any cases since your  
11 briefs were filed?

12 MR. SHARP: We have not, Your Honor. We have  
13 consulted with various experts and we have looked at  
14 LEXIS.

15 At the same time, I must say to the Court that  
16 this is an area of research where one cannot be  
17 confident that nothing exists after one has looked. We  
18 simply do not have the tools to deal with these 120  
19 signatory nations that may or may not be deciding this  
20 issue.

21 But we have nothing to offer the Court, either  
22 on behalf of the Plaintiff's position or on behalf of  
23 our position, that would be instructive to the Court.

24 I want to return to Article 24, then, of the  
25 convention, and that article is found at page 4 of our

1 reply brief. This article in our view shows that the  
2 intended reach of the limit is all-inclusive. Now, in  
3 this article there is very elaborate cross-referencing,  
4 and I intend to omit that.

5 The core language of the article begins in the  
6 third line in the middle, and the core language is that:  
7 "Any action for damages, however founded, can only be  
8 brought subject to the conditions and limits set out in  
9 this convention."

10 Now, the key phrase in this sentence is the  
11 phrase "however founded." The sentence as we read it is  
12 saying that, whatever the local law may award to the  
13 Plaintiff in the way of a remedy, whatever Plaintiff's  
14 theory of the case may be of whatever the legal basis  
15 may be for Plaintiff's case, his suit is subject to the  
16 limits of liability set out in this convention.

17 Now, the provision also confirms that the  
18 liability that is regulated by the convention is a  
19 liability that is determined in a court of law. Here  
20 again, the official version in French is possibly more  
21 helpful than the English version.

22 The version you have before you speaks of "any  
23 action for damages." The French text refers to an  
24 action "en responsabilite," which translates, we think,  
25 one for one to "liability." In other words, the French

1 text contemplates that there will be an action to  
2 establish liability or an action for liability.

3 And when we turn from the terms of the  
4 convention, which in our view show that the limit is to  
5 cover judicially determined liability, turn from the  
6 convention to the Montreal Agreement --

7 QUESTION: Before you do that, Mr. Sharp, did  
8 you find any discussion of this issue in the minutes of  
9 the convention or in earlier drafts of the convention?

10 MR. SHARP: Your Honor, there has never been  
11 to my knowledge in reading through these minutes a  
12 detailed discussion of the points that I am making at  
13 this time. The recorder for the convention that was  
14 held in 1929 -- that was Mr. Henri Deveau -- prepared a  
15 memorandum, if you will, of explanation as to what the  
16 meaning of the draft proposal was that was before the  
17 conferees that were meeting in 1929.

18 In the course of Mr. Deveau's explanation as  
19 to the limit on liability, Mr. Deveau says that this  
20 limit is intended to apply to the carrier's "maximum  
21 liability." We think that is a strong indication that  
22 it was to be the liability judgment that was imposed  
23 upon the carrier.

24 There is in Mr. Drion's book a discussion of  
25 whether or not prejudgment interest, interest awards



1 generally, are included within the limit or whether or  
2 not they can escape the limit. And Mr. Drion concludes  
3 that they are within the limit.

4 Those are the two sources that I would mention  
5 to you.

6 QUESTION: Well, I suppose there are other  
7 writers who disagree with that view and say it's an open  
8 question, isn't that so?

9 MR. SHARP: I think that there is a suggestion  
10 to that effect in the Shawcross and Beaumont text. I am  
11 trying to collect now all of the discussions. I think  
12 we have covered the principal discussions of the point.

13 I'd like to turn now to the text of the  
14 Montreal Agreement. The relevant provisions of that  
15 text are printed at page 4 of the blue brief, and it's  
16 the first three lines that begin at subparagraph (1),  
17 and those lines state:

18 "The limit of liability for each passenger for  
19 death, wounding, or other bodily injury shall be the sum  
20 of \$75,000 inclusive of legal fees and costs."

21 Now, what happened here was that when the  
22 delegates met in Montreal they knew that some nations  
23 were awarding attorney's fees and costs to the  
24 passengers and that in some instances the awarding of  
25 attorney's fees and costs meant that the carrier was

1 paying out a total that was greater than 125,000  
2 francs.

3 It was based on that knowledge that the  
4 delegates provided that the limit that you see here  
5 should be increased to \$75,000, but that limit should be  
6 inclusive of legal fees and costs. This action by the  
7 delegates, we submit, indicates that the limit contained  
8 in the Montreal Agreement is really intended to cover  
9 the waterfront.

10 Now, the Montreal Agreement also makes --

11 QUESTION: May I just ask this question? You  
12 don't deny that it might cover postjudgment interest,  
13 that postjudgment might be recoverable?

14 MR. SHARP: We do not deny that.

15 QUESTION: And I'm just wondering, would you  
16 think that a signatory state could decide for itself  
17 whether postjudgment interest should be set to run from  
18 the date the trial court judgment was rendered in one  
19 country and another one might decide it should be after  
20 all the appellate process has run its course, which  
21 might be a difference of a couple of years in some  
22 countries?

23 Could a country decide for itself the date  
24 from which postjudgment interest will run?

25 MR. SHARP: I think so, Your Honor. Our view

1 is that once the convention has placed a judgment in the  
2 hands of the passenger, it has spent its course and  
3 whatever the --

4 QUESTION: Would a country be free to decide  
5 that postjudgment interest should run from the date that  
6 the lawsuit started?

7 MR. SHARP: I think not, because then I think  
8 you're in the period -- the liability of the carrier to  
9 each passenger in the period that the convention speaks  
10 to.

11 QUESTION: You'd say that the line would be  
12 drawn at -- they could fix the date when the judgment  
13 was rendered, but not some earlier date, such as the  
14 date the complaint --

15 MR. SHARP: That's right.

16 QUESTION: -- was filed or the date the  
17 Plaintiff's evidence went in or something like that?

18 MR. SHARP: That's right.

19 Now, the Montreal Agreement we submit also  
20 makes it clear that for purposes of applying the limit  
21 one should look at the carrier's liability as finally  
22 determined in a judicial proceeding. We say that  
23 because the fees and the costs do not exist at the time  
24 of the accident, and thus the limit cannot be read as  
25 applying simply to those items of liability that may be

1 deemed to have arisen at the time of the accident.

2 There is in the negotiating history, then,  
3 further confirmation of our position. We think that  
4 negotiating history suggests that the limits in the  
5 Montreal Agreement and the Warsaw Convention were  
6 intended to cover the full extent of the carrier's  
7 liability.

8 As I responded to Justice O'Connor's question,  
9 one of the principal indications of the scope of this  
10 limit is contained in the explanation that Henri Deveaux  
11 gave to the conferees in 1929, when he described the  
12 limit as applying to the "maximum liability of the  
13 carrier."

14 Now, the courts below looked to the Montreal  
15 Agreement of 1966 and concluded that a new or different  
16 purpose sprang from that agreement. They found in the  
17 agreement of 1966 a purpose of expediting litigation and  
18 facilitating settlement, and they concluded that, in  
19 light of that new purpose, it was permissible to award  
20 prejudgment interest in excess of the limit.

21 QUESTION: Certainly the Montreal Agreement  
22 was motivated in part by a desire to speed settlement  
23 and provide for an earlier resolution of claims falling  
24 under the convention. If your position is correct, what  
25 is there left to encourage speedier resolution of



1 claims?

2 This case is a rather good example of what  
3 some might call dilatory tactics on the part of the  
4 carrier, and I just wonder what you think is left for  
5 the encouragement of speedy settlements if your position  
6 on the treaty is correct?

7 MR. SHARP: Your Honor, if the limit on  
8 liability is recognized by the Plaintiffs and the  
9 Defendants as being a guillotine that cannot be escaped,  
10 you have created the ideal environment for settlement.  
11 It's when one or both of the parties do not know whether  
12 they can break the limit.

13 I would give you as an example this case, in  
14 which Eastern made an offer of judgment to the Plaintiff  
15 in 1978 in the sum of \$150,000, which would be the  
16 equivalent of \$75,000 for both Mr. and Mrs. Mahfoud.  
17 That offer of judgment was in the Defendant's view an  
18 offer to pay its maximum liability.

19 It was not accepted because in the Plaintiff's  
20 view, no doubt, it did not constitute what the Plaintiff  
21 thought was the maximum liability. It is -- if we have  
22 an absolute limit, that is the best hope for expediting  
23 settlement in these cases.

24 I might say that the minutes of the Guatemala  
25 convention point out there the delegates to that

1 convention are discussing whether or not they should  
2 lift the willful misconduct exception to the limit so  
3 that they can then put before the parties an absolute  
4 limit that tells them really what they should settle  
5 against.

6 QUESTION: But if the carrier knows that it's  
7 likely to be hit with the maximum liability under the  
8 treaty and it can stall around with its defense of the  
9 lawsuit for years and not incur any interest as a result  
10 of it, I don't understand why it's motivated to go ahead  
11 and pay it out right away.

12 MR. SHARP: Your Honor, if the carrier can  
13 walk away from one of these cases for \$75,000 today,  
14 it's well advised to do so. The costs for litigation  
15 will greatly exceed that amount.

16 QUESTION: Well, Mr. Sharp, refresh my  
17 recollection. Did Eastern deposit \$150,000 with the  
18 court?

19 MR. SHARP: They did. As soon as the district  
20 court said our liability was limited, we paid \$150,000  
21 into the registry of the court.

22 QUESTION: And it still sits in the court's  
23 hands?

24 MR. SHARP: It may have been paid out. We  
25 simply walked away from the case as soon as we

1 discharged our liability.

2 QUESTION: Mr. Sharp, December of '82?

3 MR. SHARP: December of '28, Your Honor.

4 QUESTION: And no postjudgment interest was  
5 imposed?

6 MR. SHARP: That's correct.

7 QUESTION: Mr. Sharp, in connection with those  
8 questions, the Court of Appeals for the Second Circuit  
9 in its opinion that it handed down, as I recall in 1980,  
10 stated that Eastern did not deny liability for the  
11 \$75,000 to the proper parties, is that correct?

12 MR. SHARP: That is correct.

13 QUESTION: Did Eastern consider then  
14 depositing \$150,000 in the court, subject to the  
15 determination of who the proper parties were?

16 MR. SHARP: There is no indication of that.  
17 What I would say to you, Your Honor, is that Eastern  
18 offered every Warsaw Plaintiff an offer of judgment in  
19 an amount of \$75,000.

20 QUESTION: That was an offer of settlement.

21 MR. SHARP: Pardon me?

22 QUESTION: That was an offer of settlement.

23 MR. SHARP: Yes.

24 QUESTION: Right. But my point is, what did  
25 Eastern have to lose by depositing the money earlier

1 than it did if it took seven years before it finally  
2 deposited the money? Meanwhile, it had the use of that  
3 money. If it had been deposited and Eastern won the  
4 case eventually, it would have received its money back  
5 plus interest.

6 MR. SHARP: Your Honor, I don't know that it  
7 ever considered whether to deposit or not to deposit. I  
8 think that most defendants hold onto the money until  
9 they can get a discharge from the plaintiff. That's the  
10 one thing they have to win, is when they pay they want  
11 to leave the case, and that's what Eastern wanted.

12 QUESTION: The plaintiff doesn't get the money  
13 when it's with the registry of the court.

14 MR. SHARP: That's right.

15 QUESTION: But the interest on \$150,000 over  
16 seven years is quite substantial.

17 MR. SHARP: That's right. Your Honor, the  
18 only thing I would point out there is that the Plaintiff  
19 has never moved for a complete summary judgment against  
20 Eastern, and if they had Eastern would have certainly,  
21 as its offer of judgment suggests, been prepared to pay  
22 the limit; and if the court had ruled that prejudgment  
23 interest also had to be paid in a summary judgment  
24 proceeding, that would have concluded the litigation.

25 QUESTION: Was that motion made in --



1 MR. SHARP: It was never made.

2 QUESTION: -- 1982, when the money was paid  
3 into the registry of the court?

4 MR. SHARP: No. The Plaintiff opposed our  
5 motion to fix the liability. The Plaintiff's position  
6 was in 1982 that the limits of liability were void in  
7 light of the Second Circuit's opinion in Franklin Mint.

8 If there are no further questions, I would  
9 like to reserve the balance of my time.

10 CHIEF JUSTICE BURGER: Mr. Farrell.

11 ORAL ARGUMENT OF GEORGE EDWIN FARRELL, ESQ.,

12 ON BEHALF OF PLAINTIFFS

13 MR. FARRELL: Mr. Chief Justice and may it  
14 please the Court:

15 The basis of Petitioner's argument seems to me  
16 to be that the limits of liability stated in Warsaw and  
17 Montreal can't be exceeded, no matter what. Now, this  
18 was never intended by the delegates at Warsaw or  
19 Montreal, nor by any of the high contracting parties who  
20 ratified the treaty.

21 The delegates at the Warsaw conference were  
22 not making a wrongful death statute. They were trying  
23 to establish air law. They full understood that the  
24 articles they promulgated were dependent upon national  
25 law for implementation.

1           Almost none of the operating articles in the  
2 Warsaw convention are self-executing, and of those  
3 making up the liability section, six directly require  
4 the use of national law. The European delegates and the  
5 high contracting European parties never considered that  
6 the liability limitations set forth in Article 22 could  
7 not be exceeded.

8           It was standard procedure for them to award  
9 legal fees and costs in addition to the damages  
10 limitation. No one outside the United States even knew  
11 this was going on until the Hague conference in 1955.

12           Mr. Sharp points out that Mr. Deveau thought  
13 that the damages should be limited or that there should  
14 not be any way to exceed the damages limit. Yet, it was  
15 his country, as reported by Mr. Drion, who also awarded  
16 interest in addition to the costs and attorney's fees.  
17 Mr. Drion further said that the attorney's fees and  
18 costs are not damages arising from the conduct or the  
19 fact for which liability is imposed by the convention.  
20 Obviously, the same reasoning could apply to interest in  
21 excess of the Warsaw convention limitation, as interest  
22 is not an element of damages.

23           Thus, from the very beginning the Warsaw  
24 limitations were routinely exceeded. The very provision  
25 of Article 22 that was related to you provides that

1 interest in excess of the Warsaw limit was permissible.  
2 That provision pertained to the periodical payments  
3 which were just discussed.

4 The Petitioner's brief says that these  
5 periodical payments which permitted an excess payment  
6 over and above the Warsaw limitation took into account  
7 the time value of money. Now, that can only be  
8 interest.

9 Article 22 further provides that the  
10 limitation could be exceeded by a special contract.  
11 Article 3 provides that if you don't give notice you can  
12 exceed the Warsaw limitation. Article 25 permits the  
13 limitation to be exceeded if the conduct of the carrier  
14 so requires.

15 The Hague -- yes?

16 QUESTION: For example, what? "If the  
17 conduct"; what kind of conduct?

18 MR. FARRELL: The words are the "willful  
19 misconduct pursuant to the law of the court that is  
20 hearing the case."

21 QUESTION: What about ordinary negligence?

22 MR. FARRELL: Ordinary negligence would not do  
23 it, Justice White.

24 QUESTION: Could I ask, Eastern filed an  
25 answer, I take it, to the complaint? And based on that

1 answer, was there any issue at all that Eastern at least  
2 owed \$150,000?

3 MR. FARRELL: Eastern alleged the defense of  
4 Warsaw-Montreal, saying that its liability was limited  
5 to \$75,000.

6 QUESTION: Right, but its answer at least  
7 conceded its liability for 150?

8 MR. FARRELL: No, it did not concede its  
9 liability up to that amount. It said that it was  
10 defending, using that as a defense, that Warsaw-Montreal  
11 did apply.

12 QUESTION: How could they escape liability?

13 MR. FARRELL: Well, I don't think they could,  
14 because there were two deaths.

15 QUESTION: Well, I know. But could you read  
16 the answer? The Second Circuit said, as Justice Powell  
17 points out, that Eastern had never denied its liability  
18 up to the convention limits. Did its answer deny or  
19 not?

20 MR. FARRELL: Its answer did not deny, but it  
21 was not -- it was an affirmative defense, Your Honor.  
22 It didn't say that, we owe you \$75,000. It says that  
23 the Warsaw-Montreal provisions are applicable.

24 QUESTION: Well, which would mean that their  
25 liability is limited.



1 MR. FARRELL: Yes, indeed. They were alleging  
2 their liability was limited, correct.

3 QUESTION: But they never denied liability?

4 MR. FARRELL: They never denied liability, no,  
5 that is correct.

6 They also -- as admitted by the Plaintiff, the  
7 defense of the improper party was not valid against this  
8 Plaintiff. There were others perhaps it may have been,  
9 but not this one. So that defense, which was carried on  
10 for many years, was a spurious defense.

11 QUESTION: Well, of course you were hoping to  
12 get a recovery in excess of the liability limits, I  
13 assume?

14 MR. FARRELL: Well, when you have two  
15 Defendants in it, Justice O'Connor, that is correct. We  
16 had a right to determine if we could get adequate  
17 damages for our Plaintiff.

18 QUESTION: But you wanted to recover amounts  
19 in excess of the limits of the \$75,000 a person.

20 MR. FARRELL: I didn't particularly care  
21 whether I got it from Eastern or from the United States,  
22 Your Honor. But in fact, we did get \$1,650,000, but  
23 principally from the United States, after Eastern made  
24 its motion almost seven years after the case began.

25 QUESTION: And you never filed for summary

1 judgment against Eastern for the amount of \$75,000 each,  
2 partial summary judgment?

3 MR. FARRELL: Specifically stating that, we  
4 did not. We filed for summary judgment on the issue of  
5 liability, and we were willing to permit Eastern to  
6 maintain whatever defenses it thought it had. And that  
7 was approved by the trial court.

8 QUESTION: When?

9 MR. FARRELL: That was in 1978, Your Honor.

10 QUESTION: So that as of 1978 liability had  
11 been established?

12 MR. FARRELL: No, Your Honor, it hadn't.  
13 There was a trial --

14 QUESTION: I thought you said your motion was  
15 granted.

16 MR. FARRELL: Well, the motion was granted,  
17 but it was later overturned by the Second Circuit on a  
18 procedural ground.

19 QUESTION: Well, I know, but there was a  
20 judgment in 1978.

21 MR. FARRELL: But only on liability.

22 QUESTION: Right, just liability.

23 MR. FARRELL: Yes. Later there was an all-out  
24 trial on liability against Eastern. Eastern was found  
25 negligent. But this case was not in it because of the

1 ruling by the trial court that Eastern was liable, for  
2 liability only. So this case was not in the liability  
3 trial before the jury.

4 QUESTION: That's the judgment on page 37 of  
5 the appendix. It was entered September 26th, 1978.

6 MR. FARRELL: Yes, Your Honor. The first  
7 judgment entered was prepared by the defense firm that  
8 was defending in New York Eastern Air Lines, and they  
9 for some reason included some Article 54 words, and it  
10 had to come back, although after they made up the order  
11 themselves they then appealed it.

12 QUESTION: And what was the later trial  
13 against Eastern on liability?

14 MR. FARRELL: The trial commenced --

15 QUESTION: Well, what was the issue there,  
16 liability?

17 MR. FARRELL: The issue was whether or not  
18 Eastern was negligent in causing this accident.

19 QUESTION: What if it had been?

20 MR. FARRELL: It was found negligent, Your  
21 Honor.

22 QUESTION: And does that escape the Warsaw  
23 limits?

24 MR. FARRELL: No, it did not, Your Honor, not  
25 for a Warsaw case like this one. We always agree that

1 this is a warsaw case. The Warsaw Convention and  
2 Montreal Agreement apply to this case and we've never  
3 denied that, Your Honor.

4 QUESTION: And so why were you trying out  
5 negligence against Eastern?

6 MR. FARRELL: There were other cases in it,  
7 Justice White, many in which Warsaw did not apply.

8 QUESTION: I see.

9 QUESTION: Those were the domestic  
10 passengers?

11 MR. FARRELL: Yes, Your Honor.

12 In addition to the articles which I mentioned  
13 which permitted excess payments over and above the  
14 Warsaw limitation, there was also a dual payment, a  
15 system which came into being during the Hague  
16 conferences in 1955. This was after the United States  
17 discovered that the Europeans were exceeding the Warsaw  
18 limitation anyway.

19 So a dual system was brought into those  
20 discussions and, although the United States never  
21 ratified Hague, the dual system again was brought up  
22 during the Montreal conference and that is the provision  
23 that, in the countries that do not award fees and costs  
24 such as the United States, a limitation of \$75,000 was  
25 reached, and otherwise it would be \$58,000 plus

1 attorney's fees and costs.

2 Of course, this permits the ceiling on damages  
3 to be exceeded, depending upon the length of time,  
4 again, that the litigation takes place, because the  
5 longer the time involved the more the attorney's fees  
6 and the more the costs.

7 Thus, there never has been any prohibition on  
8 exceeding the Warsaw-Montreal limits from the provisions  
9 of the documents and the conduct of the parties that  
10 drew up the convention. The framers, the Europeans who  
11 framed Warsaw, never considered that exceeding the  
12 limitation was any problem.

13 Now, we had some discussions of Articles 24  
14 and 28, but before getting to those I would like to  
15 respond to Petitioner's comments from reading Article  
16 22.1 and his finding of apparently a 1932 French  
17 dictionary which changes the words.

18 The Congressional Record, which reports the  
19 Senate's action on the Warsaw Convention, dated June 15,  
20 1934, has the word "damages" in it. It says that:  
21 "Where, in accordance with the law of the court to which  
22 the case is submitted, damages may be awarded in the  
23 form of periodical payments," and so forth.

24 We've had this treaty in effect for over 50  
25 years, and I for one would assume that if we weren't



1 using the right words that the French people would have  
2 told us by now. I don't think that this is the time to,  
3 on a reargument, to change the wording.

4 As previously in its brief, the Petitioner has  
5 agreed that this means that under 22.1 if you have  
6 periodical payments that the excess that's paid is for  
7 the use of money.

8 Now, probably the real key to this case is in  
9 Article 24, which provides that the law of the court  
10 that hears the case shall determine the elements of  
11 damages. Now, this is a wrongful death case. The  
12 Petitioner concedes that the proper wrongful death law  
13 to be applied is the law of Louisiana, where this case  
14 was brought, including its conflict laws as well as its  
15 law pertaining to judgment interest. His problem with  
16 it is that he doesn't think that prejudgment interest  
17 could be awarded.

18 Now, Louisiana, the recovery for wrongful  
19 death may be had for a loss of love and affection and  
20 that type of recovery, loss of support, loss of  
21 services, and funeral and medical expenses. The trial  
22 court determined the loss under each of these categories  
23 and awarded damages against the United States and  
24 Eastern Air Lines in the amount of \$1,650,000, as I  
25 previously mentioned. Of that amount, \$150,000 was

1       assessed against Eastern for the two deaths.

2               In making its determination for the lost  
3       support portion of the damages award, the court first  
4       determined the loss from the time of death until the  
5       time of trial, using decedent's income at the time of  
6       death projected forward, and then determined future loss  
7       of support by using projected income from date of trial  
8       until date of majority of the three infants, reduced to  
9       present value.

10              Thus, the damages judgment was based upon the  
11      value of the human life at the time of death. The court  
12      then ordered the application of prejudgment interest  
13      from date of what they called judicial demand, or the  
14      time when the case was filed, and postjudgment interest  
15      as allowed by the specific Louisiana statute pursuant to  
16      the Louisiana procedure.

17              Thus the district court, pursuant to its law  
18      as the court before which the action was brought,  
19      determined that damages accrued at the time of death and  
20      Eastern was liable for \$75,000 per decedent, the maximum  
21      damages pursuant to the Montreal Agreement.

22              The court then determined, pursuant to Article  
23      28, that Eastern was further liable to pay interest from  
24      the date that the action was filed as compensation for  
25      the use of money rightfully belonging to the Plaintiffs

1 over the nearly seven-year period between the time that  
2 the case was filed and the time that Eastern paid its  
3 \$150,000 into the registry of the court.

4 QUESTION: Mr. Farrell, isn't that item  
5 normally considered part of the damages or compensation  
6 that would be contemplated under the terms of the  
7 treaty?

8 MR. FARRELL: I would say if you're using  
9 the --

10 QUESTION: Prejudgment interest?

11 MR. FARRELL: I would say no, Your Honor. The  
12 prejudgment interest to my knowledge, at least in the  
13 United States, is never a part of damages. It's  
14 something that is added. It's a ministerial function.  
15 It's pursuant to statute. It's never a part of damages  
16 that I know of in any of the jurisdictions in the United  
17 States.

18 Now, the proceeding in Louisiana is really no  
19 different from the provisions of Article 22.1 of  
20 Warsaw. That provision states: "Where, in accordance  
21 with the law of the court in which the case is  
22 submitted, damages may be awarded in the form of  
23 periodic payments, the equivalent capital value of the  
24 said payments shall not exceed 125,000 francs."

25 This provision specifically permits a court to

1 add interest to a damages award when payment is delayed  
2 and, as admitted by Eastern, provides compensation for  
3 the use of money, or interest.

4 Petitioner admits by delaying payment  
5 rightfully due to three orphaned children it put \$87,000  
6 into the pockets of Eastern's insurance company.  
7 Instead of paying \$75,000 per death, it actually paid  
8 approximately \$31,000.

9 The action of the Louisiana district court was  
10 absolutely proper under its law, and it is not in  
11 violation of any articles, neither Warsaw nor Montreal.  
12 And if anything, the result is no different than the  
13 periodic payment provision of Article 22.

14 Now, the Petitioner in its briefs has gone to  
15 great length in an attempt to establish that interest is  
16 an integral part of compensatory damages. In some  
17 jurisdictions throughout the world, this may be correct,  
18 but as I -- in response to Justice O'Connor's question,  
19 the jurisdiction in which the action was brought,  
20 Louisiana, and whose laws were properly used, as  
21 admitted by Eastern, the practical application of the  
22 Louisiana procedure is to establish a starting point for  
23 compensation to be paid for the use of money at the time  
24 the Plaintiff files his lawsuit and a termination point  
25 when the judgment is paid.

1           The amount of interest to be paid is  
2 determined by the amount of the damages award and the  
3 length of time involved. The theory is simple: The  
4 Defendant owed the money at the time of death and must  
5 pay the Plaintiff for its use.

6           QUESTION: Well, in Louisiana, then, what  
7 would the judgment say? It would just give a total  
8 amount, wouldn't it? What would it say?

9           MR. FARRELL: This one broke the judgment  
10 down, Justice White, into loss of support, loss of  
11 services, and so forth.

12          QUESTION: And then did it have a separate  
13 item on interest?

14          MR. FARRELL: It says "interest pursuant to  
15 law," which later -- that was in its decision. Later in  
16 the judgment, it set out the Louisiana interest  
17 provisions.

18          Now, this action was a wrongful death action  
19 which, as you were told, arose from the crash of  
20 Eastern's Flight 66 at the John F. Kennedy International  
21 Airport on June 24, 1975. And it was not until December  
22 2, 1982, that Eastern deposited \$150,000, or \$75,000 per  
23 decedent, into the registry of the court pursuant to its  
24 contract of carriage as established by the Montreal  
25 Agreement.



1           The reason for the delay stems from an  
2           agreement between Petitioner's insurance company and the  
3           United States under which the insurance company agreed  
4           to pay 60 percent and the United States 40 percent of  
5           any passenger recovery, with the specific provision that  
6           Eastern's insurance company was to have complete control  
7           over damages discovery, damages trial, appeals, and any  
8           decisions relating to the settlement or non-settlement  
9           of a particular case.

10           This is the Petitioner's fifth appeal, four of  
11           which relate to Montreal damages. The district court,  
12           as affirmed by the Court of Appeals, found that Eastern  
13           contributed to delaying the litigation to an extent that  
14           a smaller amount of money was invested in order to pay  
15           the \$75,000 claims.

16           Petitioner admits that if this honorable Court  
17           rules in its favor it will pay only 62 or \$63,000 for  
18           the two deaths, or about \$31,000 each, instead of the  
19           \$75,000 each, as ordered by the district court.  
20           Therefore, at least \$87,000 rightfully belonging to the  
21           three Mahfoud children will go into the pockets of the  
22           insurance company.

23           This result was never intended by the framers  
24           or signatories of Warsaw or Montreal. Denying  
25           prejudgment interest in this case would fail to effect

1 any purpose of the convention's framers or signatories.  
2 The decision of the district court, as affirmed by the  
3 Court of Appeals, ensures that Warsaw-Montreal  
4 recoveries will not be diminished by the simple strategy  
5 of delaying payment until the award diminishes in  
6 value.

7 The judgment should be affirmed.

8 CHIEF JUSTICE BURGER: Anything further, Mr.  
9 Sharp?

10 REBUTTAL ARGUMENT OF RICHARD M. SHARP, ESQ.

11 ON BEALF OF PETITIONER

12 MR. SHARP: Yes, Your Honors. I would like to  
13 address this problem of delay. Eastern in 1978 offered  
14 judgment in the full amount of the limits of liability.  
15 In 1982 Eastern twice moved to have the court declare  
16 what the amount of its liability was, and in the second  
17 motion the court did so and Eastern paid that liability  
18 into the court.

19 The Plaintiff opposed our motion to have our  
20 liability fixed. There are sound reasons why Warsaw  
21 Plaintiffs would not want to settle, to take the full  
22 maximum liability of the carrier and let the carrier  
23 leave the litigation. That would mean that only the  
24 United States is standing ready for the damage trial.  
25 The damage trial against the United States standing

1 alone can only be before a judge. No jury would be  
2 involved. If the Co-Defendant Eastern is present, there  
3 is a right of a jury trial.

4 The second point is that if the United States  
5 is standing liable alone, prejudgment interest on that  
6 \$1.7 million cannot be recovered. Federal law disallows  
7 the recovery of prejudgment interest against the United  
8 States. On the other hand, it does not disallow the  
9 recovery of prejudgment interest against a private  
10 defendant.

11 Accordingly, if a Plaintiff in the position of  
12 Mahfoud can, one, break the limit by alleging willful  
13 misconduct, which another Plaintiff, Mrs. Domangue, was  
14 doing in this case, or if a Plaintiff can break the  
15 limit, as Mr. Mahfoud tried to do, by relying on the  
16 Franklin Mint case when it had just come down from the  
17 Second Circuit Court of Appeals, that would allow the  
18 Plaintiff to recover prejudgment interest on \$1.7  
19 million.

20 Alternatively, the Plaintiff might be able to  
21 raise the limit, at least at this time during the  
22 litigation, by suggesting to the court that the market  
23 value of gold should be the conversion rate for purposes  
24 of fixing the limit. That notion was abroad since 1981  
25 in a case called Boeringer-Mannheim, in which the

1 district court in Texas decided that it would be the  
2 market price of gold that would set the limit.

3 What I'm suggesting to Your Honors is that  
4 there's a very, very sound reason why a Warsaw Plaintiff  
5 would not move for summary judgment and would not  
6 discharge the carrier of its liability. And in this  
7 case there was no motion by the Plaintiff for a complete  
8 summary judgment.

9 QUESTION: No, but there was a motion for  
10 summary judgment on liability.

11 MR. SHARP: Yes, Your Honor.

12 QUESTION: Which was granted, and then that  
13 judgment was reversed on purely procedural grounds.

14 MR. SHARP: That is true, Your Honor.

15 QUESTION: But the Court of Appeals for the  
16 Second Circuit didn't for a minute suggest that there  
17 was any question about liability.

18 MR. SHARP: That's right, and the Court of  
19 Appeals in that decision --

20 QUESTION: I just wonder -- the question  
21 Justice Powell asked you some time ago: Why didn't, at  
22 least in 1978, why didn't you deposit the \$150,000 so  
23 that it would accrue interest in favor of the  
24 Plaintiff?

25 MR. SHARP: Well, I think the answer is

1 because it was accruing interest in favor of the  
2 Defendant.

3 QUESTION: Well, that's right.

4 MR. SHARP: I mean, I can't state that as a  
5 fact --

6 QUESTION: So you just say that as long as we  
7 can keep the money, it's in our interest to keep the  
8 money as long as possible?

9 MR. SHARP: Yes. It's in our interest to keep  
10 the money unless we can be discharged from the  
11 litigation. That's the key to our exit from the  
12 litigation.

13 QUESTION: Well, that's an argument, all  
14 right.

15 MR. SHARP: Your Honors, our position boiled  
16 down is that the purpose and the text of the Warsaw  
17 Convention and the Montreal Agreement is to place a  
18 limit on the maximum liability of an air carrier, and  
19 prejudgment interest is part of that maximum liability.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
21 The case is submitted.

22 (Whereupon, at 11:59 a.m., argument in the  
23 above-entitled case was submitted.)

24 \* \* \*



CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1807 - EASTERN AIR LINES, INC., Petitioner V. ROBERT F. MAHFOUD, ETC.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

*Paul A. Richardson*

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(REPORTER)

